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SUPREME COURT, U.S.
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No. 93-2034

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ANTHONY SHORT,

Petitioner,

vs.

EDISON CHOUEST OFFSHORE, INC., ET AL.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENTS' BRIEF IN OPPOSITION

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SUMMARY OF THE ARGUMENT

I.

THE PETITION FAILS TO PRESENT MEANINGFUL QUESTIONS FOR REVIEW BY THIS COURT AND MAKES NO ATTEMPT TO EXPRESS ITS "QUESTIONS PRESENTED FOR REVIEW" IN THE TERMS AND CIRCUMSTANCES OF THE CASE.

The petition should be denied for failing to comply with substantive rules of this Court which relate to the critical determinations of what questions are presented for review and whether the Court has jurisdiction to review the judgment which Petitioner would bring before it. First, a reading of Petitioner's questions presented for review reveals that Petitioner has failed to comply with the mandate of Supreme Court Rule 14.1(h) to express questions "in the terms and circumstances of the case" and in a manner that is "not . . . argumentative." Petitioner, ignoring that instruction, formulated "questions" which are merely argumentative statements of legal truisms unconnected in any fashion to the facts or ruling in this case. Since the petition fails to inform the Court of any real question for resolution, the petition is due to be denied.

II.

THE PETITION DOES NOT DEMONSTRATE THAT THE "QUESTIONS PRESENTED FOR REVIEW" WERE PROPERLY RAISED AND DISPOSED OF IN THE ALABAMA COURTS "SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THE JUDGMENT ON A WRIT OF CERTIORARI."

Petitioner has also failed to establish that his "questions" were raised in the lower courts. That failure violates Supreme Court Rule 14.1(h) which demands that the petition establish when and how the questions of which Petitioner seeks review were raised in the courts below and how those lower courts passed on them. Petitioner's failure to establish not only when and how, *but indeed whether* his "questions" were raised below prevents this Court from determining whether it has "jurisdiction to review the judgment on a writ of certiorari." Therefore, the petition is due to be denied.

III.

THE PETITION SEEKS ONLY A FACTUAL REVIEW.

An additional reason for the denial of this petition is that the issue actually presented for resolution is factual, not legal. Supreme Court Rule 10 establishes that the discretionary writ of certiorari is reserved for those cases which would present "important" legal questions of "federal" law. And, this Court has made clear that it is a court of law, distinguishing itself from "a court for correction of errors in fact finding." Goodman v. Lukens Steel Co., 482 U.S. 656, 665 (1987). Notwithstanding, it is precisely an issue of fact which this Court would be called upon to resolve if this petition were granted. In an unarguable conclusion of law, the trial court below concluded:

> For [Petitioner] to prevail on his claim for unseaworthiness, [Petitioner] must establish that [Respondents'] vessels or appliances were in some manner defective, i.e., not reasonably fit for their intended use.

Appendix A to Petitioner's brief, pp. 29, 30. The trial court then found that the Petitioner had failed to produce sufficient evidence to create a jury question on that material element, i.e., the existence of a defect. Being unable to assail the legal conclusion regarding defect, the Petitioner would have this Court evaluate the trial court's finding regarding his evidence. This Court, however, "[should] not grant certiorari to review a decision that turns solely upon an analysis of facts, or to determine whether the evidence supports a judgment of a [trial] court." 13 James W. Moore et al., Moore's Federal Practice § 810.41 (2d ed. 1993). Thus, this petition should be denied.

IV.

THE ACTUAL RULING OF THE ALABAMA COURTS, AS DISTINGUISHED FROM THE PETITIONER'S MISREPRESENTATION OF THE RULING, IS BASED ON EMINENTLY CORRECT PRINCIPLES OF LAW.

The petition is also due to be denied for the reason that the actual ruling which this Petitioner would bring before this Court is based on eminently correct principles of law. In fact, a comparison of the petition and the actual ruling of the Alabama courts (which appears in Appendix A to Petitioner's brief) reveals that the Petitioner does not attack the actual ruling. The Petitioner, for instance, complains that the Alabama courts required him to "identify the single substance which triggered" his alleged illness. (Petitioner's brief, p. 11 (emphasis in original)). In truth, however, the Alabama courts came to the unarguable conclusion that a vessel cannot be deemed unseaworthy "if the vessel is not in some manner defective." This Court's decision in Waldron v. Moore-McCormack Lines, 386 U.S. 724 (1967) was cited in

support of that holding. Thus, the true holding of the Alabama courts was that the concept of defect is inherent in the doctrine of unseaworthiness. Again, it is the courts' finding regarding the insufficiency of Petitioner's evidence which Petitioner would have this Court evaluate. And, contrary to Petitioner's assertions, the trial court's actual finding was that Petitioner's claim failed for the reason that he was unable to identify *any* defect aboard any of Respondents' vessels as the causative agent of his illness. That is, the trial court found that Petitioner could not identify so much as one substance as a defect aboard the vessels.

In addition, it is crucial for this Court to note that the Alabama courts did not require a showing of notice of a defect in the context of Petitioner's claim for unseaworthiness. In fact, the notion of notice in the lower courts' ruling applied solely to the negligence claim. This is made clear by express terms in the courts' decision.

Respondents also point this Court to the fact that the petition is based on an affidavit of Petitioner's treating physician which was executed *after* the trial court ruled and entered judgment.

Respondents also note that the trial court's ruling was supported by the *alternative* basis that Petitioner's illness was caused by his abnormal immune system and not by any defect aboard Respondents' vessels. That is to say, due to his abnormal immune system, the Petitioner suffered an idiosyncratic reaction to a substance (he knows not what) that he chanced to encounter (he knows not where or when). The trial court found:

> If the [Petitioner] does in fact suffer from occupational asthma, then his condition was caused by an abnormal, i.e., allergic response of the [Petitioner's]

body which occurred as a result of exposure (at times unknown) to an allergen (which is also unknown).

See Appendix A to Petitioner's brief, pp. 27, 28.

V.

THE PETITIONER MISREPRESENTS THE NATURE OF HIS CLAIMS.

Petitioner's Jones Act and unseaworthiness claims are not analogous to a workers' compensation action. It is the provision of maintenance and cure, not damages under the Jones Act or the doctrine of unseaworthiness, which provides a seaman a workers' compensation remedy. Thus, the Petitioner's discussion of workers' compensation constitutes a misrepresentation of the governing legal standard. The petition is therefore due to be denied.

ARGUMENT

I.

THE PETITION FAILS TO PRESENT MEANINGFUL QUESTIONS FOR REVIEW BY THIS COURT AND MAKES NO ATTEMPT TO EXPRESS ITS "QUESTIONS PRESENTED FOR REVIEW" IN THE TERMS AND CIRCUMSTANCES OF THE CASE.

According to the first of Petitioner's "questions presented for review," he seeks a writ of certiorari in order that this Court might resolve whether a claimant under the Jones Act, 46 U.S.C. § 688 (1982), is entitled to have his case decided under established maritime law

principles rather than erroneous legal principles "unique" to the courts of Alabama. The second "question presented for review" is equally profound. It merely asks whether uniformity of the law is an appropriate goal for courts deciding maritime injury cases. Clearly such "questions" fail to comply with Rule 14.1(a) of this Court's rules which requires that questions presented for review be "expressed in the terms and circumstances of the case" and that they "not be argumentative." The obvious purpose of this Rule is to apprise this Court immediately (indeed, "on the first page following the cover") of the precise legal questions the petition is raising and the factual contexts in which they arise. The Respondents submit that the petition utterly fails to so apprise the Court and for that reason should be denied.

The two "questions" presented neither define a legal issue which this Court (or any court) might review nor are they stated in "the terms and circumstances of the case." In the first question - whether "a Jones Act seaman [is] entitled to have his maritime personal injury action adjudicated pursuant to Federal Jones Act and General Maritime Law principles" - one can only speculate as to the issue the Court is asked to decide. Does Petitioner actually present a question for resolution? If so, what is it and in what context did it arise in this suit?

There can be no doubt that a seaman, or any other plaintiff for that matter, is entitled to have his or her case decided in accordance with established legal principles. The answer to the Petitioner's first question, therefore, is in the affirmative. But having said "yes" to this question, what have we said? We have said nothing actually because we have done nothing more than agree with a truism.

The question is also argumentative because, in its

convoluted style, it says only that the Alabama Supreme Court applied "unique law" (presumably he means erroneous law) in deciding the case before it. But to say nothing more than that the Alabama court should not have applied "unique law" says nothing and does not enlighten this Court on the issues presented for decision.

The second question, which posits uniformity of the admiralty law as a laudable objective, is similarly deficient. It does not present a legal question nor does it demonstrate how this question (whatever it is) arises from the facts of this case. Rather it merely argues that the decision of the Alabama Supreme Court, presumably because it applied "unique law," militated against the jurisprudential goal of "uniformity."

We submit therefore that the Petitioner has failed "to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration" and that this failure clearly constitutes "sufficient reason for denying the petition." Rule 14.5.

Section (h) of Rule 14.1 illustrates the merit of Respondents' argument. That Rule requires the Petitioner to demonstrate that he in fact raised in the state courts below the "federal questions" on which review is sought. One may, therefore, legitimately ask whether, by urging on the Alabama Supreme Court the principle of "uniformity," or by cautioning it against the application of "unique law," the Petitioner actually raised questions of federal law now reviewable by this Court or merely recited unarguable jurisprudential platitudes.

The "questions" in Petitioner's brief do not apprise this Court of any question of federal law for its review nor do they inform Respondents of any issue we must address in

opposing this petition. The "questions" do not present what is "essential to a ready and adequate understanding of the points requiring consideration." Rule 14.5. Thus there are no real questions presented for review and the petition, on this ground alone, should be denied.

II.

THE PETITION DOES NOT DEMONSTRATE THAT THE "QUESTIONS PRESENTED FOR REVIEW" WERE PROPERLY RAISED AND DISPOSED OF IN THE ALABAMA COURTS "SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THE JUDGMENT ON A WRIT OF CERTIORARI."

This petition does not attempt to demonstrate to this Court that it has the requisite appellate jurisdiction and, therefore, should be denied for this reason as well. Supreme Court Rule 14.1(h) mandates that the Petitioner's Statement of the Case "specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised." In addition, the Petitioner must identify "the method or manner of raising [the federal questions sought to be reviewed] and the way in which they were passed upon by [the state courts]." The Petitioner is finally directed to provide "such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears." Demonstrable compliance with Rule 14.1(h) is essential to the granting of a petition because its purpose is to enable this Court to determine whether or not a petitioner has, in the state trial and appellate courts, preserved for appeal the supposed federal questions upon which review is sought.

This Petitioner has ignored altogether the requirements of Rule 14.1(h) thereby making it impossible for this Court to determine whether it has jurisdiction to review the judgment which Petitioner seeks to bring before it. Even careful (and repeated) readings of Petitioner's Statement of the Case fail to reveal at what stage *or even whether* his questions presented for review were raised at trial or on appeal in the Alabama courts. This is not surprising given the fact that Petitioner has not presented any meaningful questions for review. As to Petitioner's first "question," nowhere in the Statement of the Case does he document that he argued to either court that a "Jones Act seaman [is] entitled to have his maritime personal injury action adjudicated pursuant to Federal Jones Act and General Maritime Law principles" rather than by some other law. The same can be said for Petitioner's second "question" which involves the notion of uniformity. And because the Petitioner does not (and cannot) demonstrate that these questions were raised, it follows that he does not (and cannot) specify whether or how the Alabama courts passed upon either of these "questions." As noted above, the Petitioner's "questions" are merely declarations which no court, including those sitting in Alabama, would dispute.

Perhaps the questions of which Petitioner actually seeks review are not those nominally set out as such. Perhaps an actual federal question which this Court might review might be buried elsewhere in the petition. (Such speculation is necessary only because the Petitioner failed to formulate his questions presented for review in accordance with the rules of this Court.) We note for instance that the Petitioner claims in his Conclusion that "Sentilles v. Inter-Caribbean Shipping Co. [sic.], [361 U.S. 107 (1959)], provides the precedent for this petition." Thus, one might speculate, after sifting through the petition, that Petitioner's real grievance is a conflict he

perceives between the ruling of the Alabama courts and this Court's opinion in Sentilles. However, even if this speculation is accurate, the Petitioner has still failed to apprise this Court of whether, when and how Sentilles was raised below and if so, how the Alabama courts passed on it. Moreover, the Petitioner's statement that Sentilles is the "precedent" for his petition is no substitute for a clear and concise statement of the questions presented for review. No prior decision may be transformed into a question for review by its mere citation.

The petition does not show to this Court that it has appellate jurisdiction to review the judgment of the Alabama courts and for that reason is due to be denied.[1]

III.

THE PETITION SEEKS ONLY A FACTUAL REVIEW.

This petition is also due to be denied for the reason that it presents this Court with no legal question - "important," "federal" or otherwise - for resolution. Rather, the Petitioner, unable to dispute the actual and unassailable legal conclusions of the Alabama courts, asks the United States Supreme Court to review a factual finding. Such a task does not warrant the attention of this Court.

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[1]As noted, under Rule 14.5, Petitioner's failure to comply with Rules 14.1(a) and 14.1(h) constitutes sufficient grounds for denial of the petition. In addition, the Petitioner has ignored Rule 14.1(f) which required him to set out verbatim the statutes and constitutional provisions involved in the case. The Petitioner did not set out any statute or constitutional provision, e.g., the Jones Act. While perhaps not dispositive, as are Petitioner's violations of the rules regarding the questions presented for review and jurisdiction, the Petitioner's violation of Rule 14.1(f) illustrates his disregard of what this Court requires of one seeking to obtain its discretionary attention.

Supreme Court Rule 10 makes clear that the discretionary writ of certiorari is reserved for those cases which would present this Court with "important" legal questions of "federal" law. And, as a leading commentator instructs, "[a]n issue of fact is not 'important' for purposes of Rule 10." 13 James W. Moore et al., Moore's Federal Practice ¶810.41 (2d ed. 1993). Goodman v. Lukens Steel Co. illustrates the validity of that instruction. 482 U.S. 656 (1987). In Goodman, this Court identified itself as a "court of law . . . rather than a court for correction of errors in fact finding." 482 U.S. at 665. It is precisely an issue of fact, though, which this Court would be addressing if this petition were granted. A brief review of what transpired below makes this clear. The trial court concluded that the Petitioner, to recover on the doctrine of unseaworthiness, was required to demonstrate a defect aboard one or more of Respondents' vessels. This conclusion of law is unarguable. The trial court, based on hundreds of pages of deposition testimony and various affidavits, then found that the Petitioner failed to produce sufficient evidence to create a jury question on that material element, i.e., the existence of a defect. While the evidence is discussed in succeeding sections of this brief, it is important at this point to understand that it is the lower court's findings regarding the Petitioner's evidence which Petitioner wants this Court to evaluate, not the court's legal conclusion as to the substance of the applicable maritime law.

This "Court [should] not grant certiorari to review a decision that turns solely upon an analysis of facts, or to determine whether the evidence supports a judgment of a [trial] court." 13 James W. Moore et al., Moore's Federal Practice, supra. Nonetheless, the decision which Petitioner desires to bring before this Court is just such a decision. Since the petition seeks only a factual review and does not present a legal question for resolution, the

petition is due to be denied.

IV.

THE ACTUAL RULING OF THE ALABAMA COURTS, AS DISTINGUISHED FROM THE PETITIONER'S MISREPRESENTATION OF THE RULING, IS BASED ON EMINENTLY CORRECT PRINCIPLES OF LAW.

Respondents submit that the Alabama Circuit and Supreme Courts followed eminently correct principles of law in disposing of this case. Indeed, the Petitioner nowhere attacks the real holdings of the trial court and the Alabama Supreme Court. Rather his attack focuses on phantom legal conclusions which neither of the courts below ever made. It will, therefore, be helpful to examine the holdings the Petitioner claims the Alabama courts made and compare them with the courts' actual holdings.

Petitioner, who claims to suffer from an allergic form of asthma, contends in his Statement of the Case that the Alabama courts held that a seaman could have no cause of action against his employer for supposedly contracting occupational asthma, "unless that seaman could identify the single substance which triggered his occupational asthma." (Petitioner's brief, p. 11 (emphasis in original)). Again in his Argument, Petitioner make the same incorrect statement:

> [T]he Alabama Supreme Court required that Anthony Short show which of the myriad of chemicals to which he was exposed was the cause or trigger of his asthma.

Id. at 15 (emphasis in original). Similar misstatements are found on pages 16 and 19 of his brief. All are wrong.

They are gross misrepresentations of the holding of the Alabama Supreme Court.

In truth the court below held that a vessel cannot be deemed unseaworthy "if the vessel is not in some manner defective," citing Waldron v. Moore-McCormack Lines, 386 U.S. 724 (1967). (See Appendix A to Petitioner's brief, p. 29). This is a correct statement of law and significantly one which Petitioner nowhere contests. As this Court said in Waldron, "[a]s regards equipment, the classic case of unseaworthiness arises when the vessel *is either insufficiently or defectively equipped.*" Waldron, 386 U.S. at 726 (emphasis added).

This Court has explained the concept of unseaworthiness also in the following terms:

> Trawler Racer involved the *defective* condition of a physical part of the ship itself. But our cases have held that the scope of unseaworthiness is by no means so limited. A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be *defective,* her appurtenances in disrepair, her crew unfit.

Usner v. Luckenback Overseas Corp., 400 U.S. 494, 499 (1971) (emphasis added) (citations omitted). In other words, the vessel's gear, appurtenances or crew might be defective but it must be shown that *something* about the ship is defective. See also, Reed v. YAKA, 373 U.S. 410, 411 (1963) ("The judge held that the *defective* pallet supplied by Pan-Atlantic rendered Waterman's Yaka *unseaworthy.*" (emphasis added)); Mahnich v. Southern S.S. Co., 321 U.S. 96, 103 (1944) (The staging from which the plaintiff fell was unseaworthy "because of the *defective* rope with which it was rigged." (emphasis added)).

Thus there was nothing "unique" about the Alabama Supreme Court's holding that inherent in the doctrine of unseaworthiness is the concept of a defect. For a vessel to be unseaworthy it must, in some manner, be defective. It may be that she is defective in her gear, her appurtenances or her crew, but she must be defective, and a plaintiff who seeks recovery on the doctrine of unseaworthiness must demonstrate some defect. The court nowhere held that a plaintiff was required to "identify *the* single substance which triggered his occupational asthma" (Petitioner's brief, p. 11 (emphasis in original)), and to so contend is false. Rather the Alabama Supreme Court (and the Circuit Court of Mobile County) held that, "[f]or plaintiff to prevail on his claim for unseaworthiness, plaintiff must establish that defendants' vessels or appliances were in some manner defective." (R.523).

The trial court held, on the basis of the depositions and affidavits before it, that the weight of Petitioner's evidence was insufficient to establish a genuine issue as to any material fact with respect to the existence of a defect or defective condition aboard the Respondents' boats and the Alabama Supreme Court correctly affirmed this determination. This finding was correct because the Petitioner's physician, Dr. Lorino, when he was deposed, had not a clue as to the cause of the Petitioner's condition.

Q. Okay. Now, can you identify the agency [which caused the Petitioner's occupational asthma]?

A. No.

R. 441, 442. The same doctor candidly admitted in his deposition that he did not know any of the substances to which the Petitioner might have been exposed.

Q. . . . Can you, Dr. Lorino, identify in any of these published lists of known occupational allergens any of the things which Mr. Short was exposed to?

A. Unless some of the spray paints contained isocyanates, no, I can't because *I don't know of any specific substances or names that he was exposed to.*

R. 461 (emphasis added). Indeed, the doctor is utterly unaware of the cause of the Petitioner's problems as the following colloquy at his deposition demonstrates:

Q. Well, as I understand it, he said he went down into the tank, so it could be whatever had been carried in the tanks?

A. Right.

Q. Or it could be spray paint which was, spray painting which was going on --

A. In the tanks.

Q. -- in the tanks or on the boat; am I right so far?

A. It could have been. It could have been any of those things.

Q. Or you say it could have been chemicals which were used to clean the inside of the tanks?

A. That's correct.

Q. All right, sir. And I assume it could have been most anything else that happened to have been aboard the boat at that particular time?

I mean what I'm getting at is that we are just in our normal environment are subjected to all sorts of fumes and I don't mean fumes in the sense that, you know, something that you necessarily detect. But as we're sitting here in this room which looks clean to me, we're inhaling all sorts of things, aren't we?

A. Yes.

Q. Okay. So it could be any of those things?

A. Yes, it could be. That's certainly true.

R. 443, 444. When confronted with such testimony the court properly ruled that no genuine issue of fact existed as to the existence of a defect aboard the Respondents' vessels. No plaintiff creates an issue of fact when his treating pulmonologist admits that his respiratory ailment could have been caused by the fumes he encountered in his normal environment. The trial court and the Alabama Supreme Court were thus correct.

It is critical that the trial court's determination as to the insufficiency of Petitioner's evidence related to the material element of the existence of a defect, not to causation. Therefore, the slight or "featherweight" burden of proof is not applicable. Rather, as to the element of defect, the Petitioner was properly held to the typical higher burden of proof. Petitioner's argument that "some proof" or "any evidence" should have sufficed is thus without merit. (Petitioner's brief, p. 14).

Further, and also for the reason that the trial court's ruling was based on the absence of proof of a defect, Petitioner's reliance on Schulz v. Pennsylvania R.R., 350 U.S. 523 (1956) is misplaced. Schulz involved the death

of a tug fireman. The evidence was that the deceased was working on icy decks of unlit tugs on the winter night of his death and that his "half-robed body [was discovered] with a flashlight gripped in his hand." 350 U.S. at 526. *The lower court in Schulz assumed a breach of duty, but concluded that the plantiff had failed to establish proximate cause.* Unremarkably, this Court reversed. Moreover, the question presented in Schulz was one of proximate causation, not of the existence of a defect to which a higher burden of proof applies. Schulz is therefore inapposite to the Alabama courts' finding that the Petitioner failed to produce sufficient evidence to create a genuine issue of fact on the material element of defect.

It is significant that, contrary to Petitioner's assertions noted above, the Alabama Supreme Court did not base its decision on the Petitioner's failure to identify the specific substance causing his allergic asthma. Rather it based its ruling on the fact that Petitioner was "unable to identify *any* substance aboard *any* of defendants' vessels as the causative agent of his allergic asthma." (Appendix A to Petitioner's brief, p. 30 (emphasis added)). The court did not hold that the Petitioner was required to identify just *one* specific substance as *the* cause of his ailment. Rather it found against the Petitioner because he could not name so much as *one* chemical as the possible cause of his ailment or demonstrate when he encountered it or on what boat or under what circumstances. The Alabama Supreme Court was correct in so finding, and the petition for certiorari must be denied.

The Petitioner also misrepresents that the Alabama courts required him to establish notice on part of the Repondents to prevail on the *unseaworthiness* claim. (See, generally, Petitioner's brief, pp. 17, 18). This is demonstrably false. The notion of notice in the lower court's ruling, by express and unmistakable terms, applied

solely to Petitioner's *negligence* claim, not to his claim on the warranty of seaworthiness. The ruling of the Alabama courts is as follows:

> *[O]n his claim for negligence* . . . if [Petitioner] cannot identify any substance aboard any of [Respondents'] vessels as the cause of his alleged injury, he cannot prove that [Respondents] knew or should have known of the presence of any substance aboard their boats which was supposedly harmful to the [Petitioner].

Appendix A to Petitioner's brief, pp. 30, 31 (emphasis added). This passage clearly illustrates that the Alabama courts correctly attached the concept of notice to Petitioner's claim of negligence and not to his claim for unseaworthiness. Only in this appropriate context, and nowhere else, is the concept of notice incorporated. The very text of the lower courts' ruling prevents Petitioner from legitimately contending otherwise.

It must be noted here that the opinions of Dr. Lorino, on which Petitioner almost solely relies in his petition, were opinions expressed by him in an affidavit dated June 17, 1993, *one day after the trial court granted Respondents' motion for summary judgment.* The summary judgment was granted June 16, 1993. (Petitioner's brief, p. 33). Respondents submit that it is, at best, grossly improper for the Petitioner to place his reliance on an affidavit which was not before the trial court when judgment was entered especially without disclosing such fact to this Court. It is also improper, we submit, particularly under such circumstances, to refer to the "testimony" of Dr. Lorino supposedly entitling Petitioner to a grant of certiorari without revealing that this "testimony" is contained in his tardy affidavit, and not his deposition.

But let us ignore for the moment the fact that Petitioner filed this affidavit *after* the trial court's ruling, and let us also ignore the fact that the Alabama courts were, for this reason, entitled to disregard the affidavit altogether. Examining the affidavit itself, we find that it creates no issue fact whatsoever.

Looked at in its entirety, the thrust of the affidavit is essentially that the various "dusts, mists and fumes" (R. 280) to which Petitioner was exposed caused his occupational asthma. This *might* be sufficient if this were merely a workers' compensation suit. (See Section V below). But it is not a mere compensation suit. Rather it is one for damages and one in which, for a plaintiff to prevail, he must show not merely that his condition was employment related but, rather, that his condition resulted from some defect or defective condition aboard one of the boats on which he worked. This was the thrust of the trial court's ruling. It was premised on Petitioner's inability to show that *any defective condition* aboard one of the Chouest boats was responsible for his condition.

The affidavit, for instance, says that Mr. Short's allergic condition "resulted from his exposure" to various "dusts, mists and fumes." (R. 280). Dr. Lorino states that "[s]everal of the chemicals" used on various Chouest boats "are allergens known to cause occupational asthma." (R. 280-282). The affidavit is replete with similar statements. But these statements miss the point. A fair analysis of the trial court's findings shows that its ruling was based not on the Petitioner's inability to show that some chemical, dust or mist caused his condition (all substances in nature are chemicals) but that some *defective condition* aboard a Chouest boat caused his allergic illness.

The trial court held in an unassailable proposition of

law that:

> For plaintiff to prevail on his claim for unseaworthiness, plaintiff must establish that defendants' vessels or appliances were in some manner defective, i.e., not reasonably fit for their intended use.

Appendix A to Petitioner's brief, pp. 4, 5. Petitioner now, as before, seeks to obfuscate the issues in this case and convince this Court that, in order to prevail, he need only show that sometime, somewhere, a chemical he inhaled caused an allergic (idiosyncratic) reaction on his part. This *might* work if this were indeed a workers' compensation action as the Petitioner has represented to this Court. But Petitioner's action is not governed by workers' compensation principles; it is governed by the principles of the maritime law and under these principles the Petitioner failed to raise any issues of material fact to be presented to a jury.

To be sure, the affidavit (which appears to have been prepared by Petitioner's counsel for Dr. Lorino's signature *after* the Circuit Court ruled and entered judgment) stated that many of the chemicals used in the offshore industry "are not harmless chemicals." (R. 283). But being "not harmless" does not equate to "defective." It does not raise an issue as to a material fact because a shipowner is not "obligated to furnish an accident-free ship." He is not required to furnish a hazard-free or "harmless" ship. Rather, he is required to furnish only a vessel "reasonably fit" for its intended use. Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 317 (1964) (quoting Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960)). He is not required to furnish a boat altogether free of "not harmless substances." The Petitioner here seeks to argue that merely because the Plaintiff *might* have contracted his allergic condition from a "chemical" he chanced to

encounter aboard a Chouest boat, he is ipso facto entitled to recover. Such *might* be the law governing workers' compensation claims but it is not the law governing maritime actions for damages under the Jones Act for negligence or the general maritime law for unseaworthiness.

The Court will also note that the trial court's decision was supported by an *alternative* basis which was adopted by the Alabama Supreme Court. On the basis of undisputed evidence, and assuming arguendo that Petitioner suffered from the asthmatic condition alleged, the trial court held that because the Petitioner had an abnormal immune system, and because his response to the chemicals to which he might have been exposed was idiosyncratic in nature, the actual cause of his problems was his abnormal immune system, not the substances to which he might have been exposed. (See Appendix A to Petitioner's brief, pp. 26-28, 31, 32.) Both lower courts made that finding in unequivocal language:

> If the plaintiff does in fact suffer from occupational asthma, then his condition was caused by an abnormal, i.e., allergic response of the plaintiff's body which occurred as a result of exposure (at times unknown) to an allergen (which is also unknown).

See Appendix A to Petitioner's brief, pp. 27, 28. The holding is a factual one dealing with causation, not a legal one improperly importing products liability law into admiralty.

Yet nowhere does Petitioner attempt to come to grips with the fact that the condition for which he seeks damages is an allergic reaction to an unidentified substance -- not an illness caused by some defective condition aboard Respondents' boats. Thus, even if we assume that

Petitioner contracted asthma as a result of inhaling a "chemical" while at work, he still cannot recover because, as demonstrated by the uncontradicted testimony of both Petitioner's physician, Dr. Lorino, and Respondents' consultant, Dr. Richard deShazo, the actual cause of the Petitioner's disorder is an abnormality of his own immune system, not a defective or hazardous condition aboard a boat on which he worked.

Dr. Lorino himself admitted that occupational asthma is "an allergic form of asthma which is triggered by an abnormal immune response in the patient." (R. 437, 438) The cause of the Petitioner's problems, by Dr. Lorino's admission, is thus the Petitioner's own defective immune system, not a defective condition aboard a boat.

Occupational asthma is an extremely rare condition. The trial court found, based on the testimony of Dr. Lorino and the affidavit of Dr. deShazo, that occupational asthma "is found in only an exceedingly small percentage of the population." (R. 522). The court went on to find that "it is uncontested that occupational asthma is a disease which affects, at most, only one-quarter of one percent of the population." (R. 522).

It follows that if the reaction experienced by the Petitioner is one which would be experienced by less than one-quarter of one percent of the population, then the condition which triggers it cannot be characterized as a defect -- which, as previously demonstrated, is an absolute necessity for a finding that a vessel or its equipment is unseaworthy.

Respondents submit, therefore, that the trial court and the Alabama Supreme Court scrupulously followed established maritime law principles in deciding this case and correctly resisted the "unique law" which Petitioner

sought to force on it from the beginning. It correctly held that under the law of admiralty, the Petitioner must show the existence of some defect aboard one or more of the boats on which he worked and that this defect (not some abnormality of his immune system) caused the ailment for which he now seeks to recover. And it correctly held that he had failed to meet these burdens placed on him by the "Federal Jones Act and General Maritime Law."

The ruling of the Alabama courts is based upon sound and settled principles of maritime law. The petition is due to be denied.

V.

THE PETITIONER MISREPRESENTS THE NATURE OF HIS CLAIMS.

The Petitioner blatantly misrepresents the nature of his claims, thereby incorporating into his petition an improper standard of liability. For this additional reason, the petition should be denied.

The Petitioner misrepresents to this Court that his claims based on the Jones Act and on the general maritime warranty of seaworthiness are "his seaman's workers [sic] compensation remedy." (Petitioner's brief, p. 17). Petitioner made the same misrepresentation to the Alabama Supreme Court:

> This is an action by a seaman seeking a seaman's workers [sic] compensation remedy, i.e. an action based upon unseaworthiness and the Jones Act . . .

Petitioner's Application for Rehearing to the Alabama Supreme Court, p. 3. As Petitioner must be well aware,

this statement is false. Neither the Jones Act nor the general maritime warranty of seaworthiness are analogous to workers' compensation. As the court in Alrayashi v. Rouge Steel Co. explained, it is the provision of maintenance and cure, not damages under the Jones Act or the seaworthiness warranty, which amounts to a seaman's workers' compensation remedy:

> An action for maintenance and cure is general maritime law's equivalent of workmen's compensation . . . Maintenance and cure is a claim independent of a claim under the Jones Act or a claim of unseaworthiness.

702 F. Supp. 1334, 1338 (E.D. Mich. 1989).

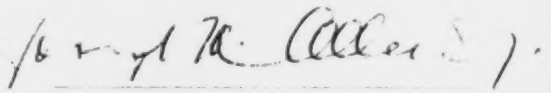
The foregoing is noted to make clear that the elements of the Petitioner's actual causes of action required him to prove fault under the Jones Act and the existence of a defect under the unseaworthiness claim. The Petitioner's allusions to workers' compensation are wholly immaterial and constitute a misrepresentation of the legal standard which governed his action. The petition is therefore due to be denied.

CONCLUSION

This petition fails to present any legal question for resolution. Further, the petition fails to establish that the nominal questions presented for review were properly raised and disposed of below and, for that reason, fails to show to this Court that it has jurisdiction to review the judgment on a writ of certiorari. Finally the petition would have this Court evaluate a factual finding. This is clear from the fact that the ruling of the Alabama courts is based on eminently correct principles of maritime law.

For these reasons, the Respondents request that the petition be denied.

Respectfully submitted,



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